SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM.

THE ERIE AND WESTERN TRANSPORTATION COMPANY, and
THE BRITISH AND FOREIGN INSURANCE COMPANY (Limited),
THE INSURANCE COMPANY OF NORTH AMERICA,
THE UNION MARINE INSURANCE COMPANY, and
THE MARINE INSURANCE COMPANY (Limited),
Petitioners,
vs.
THE UNION STEAMBOAT COMPANY, Claimant of the Propeller "New York."

No. 277.

BRIEF FOR THE UNDERWRITERS ON THE CARGO OF THE PROPELLER "CONEMAUGH".

The original libel in this cause was filed by the Erie & Western Transportation Company, owner of the propeller Conemaugh, in behalf of itself as such owner, and also as trustee for the owners of the cargo with which the Conemaugh was laden at the time of the collision.

The damages resulting from the collision to the hull of the Conemaugh were more than $20,000; the damage to the cargo was about $30,000, and the salvage expenses

made necessary by the collision amounted to about $10,000; total, $69,978.91.

The several insurance companies above named were underwriters on the cargo, to whom it was abandoned subsequent to the collision; who, having paid the owners thereof as for a total loss, became thereby subrogated to all the rights of the owners of the cargo. After the cause was at issue, these several insurance companies, by an order of the Court, were permitted to intervene for their respective interests.

The District Court held the New York wholly in fault for the collision, and decreed, among other things, that her owner should pay the entire loss to the cargo as well as to the hull of the Conemaugh. The Circuit Court of Appeals reversed this decree. The underwriters united with the owner of the Conemaugh in the petition for certiorari by which the cause was removed from the Circuit Court of Appeals into this Court. As owners of the cargo by virtue of the abandonment, the interests of the underwriters are independent of those of the owners of the Conemaugh, although both are interested in having the New York condemned for the collision.

A full statement of the facts of the case is contained in the brief of counsel for the owner of the Conemaugh, and need not be repeated here.

ASSIGNMENT OF ERRORS.

It is submitted that the Circuit Court of Appeals erred

1. In not holding that the propeller New York was in fault;

(a) For want of a proper and sufficient lookout.

(b) For not checking her speed or stopping after it was evident that the two steamers were approaching each other so as to involve risk of collision.

(c) For not properly holding her course, she being on the starboard side of the Conemaugh, and the steamers being on crossing courses so as to involve risk of collision.

(d) For not paying attention to or answering the signals of the Conemaugh, thereby violating Rules I., II., III., prescribed by the Supervising Inspectors.

2. For not holding that the New York was liable for the entire amount of the damages resulting to the cargo of the Conemaugh, even if both the Conemaugh and the New York were in fault for the collision.

3. In not affirming, as to the underwriters, the decree of the District Court which awarded to them their entire claim for the loss of the Conemaugh's cargo, against the New York.

We shall not argue in this brief that the Conemaugh was faultless, but leave her case with the advocates of the original libelant. We submit, however, in view of the many gross and glaring faults on the part of the New York, and the absence of all ordinary care and vigilance on the part of her navigators, that the Conemaugh ought not to be condemned upon merely technical grounds, or in the absence of clear and convincing proof of some fault on her part which was the proximate cause of the collision.

Upon the facts disclosed by the record and upon the findings stated in the opinion of the Circuit Court of Appeals the New York should be held in fault in several particulars.,

1. For not maintaining a proper and sufficient lookout.

2. For not checking her speed or stopping after it was evident that the two steamers were approaching each other so as to involve risk of collision.

3. For not properly holding her course, she being on the starboard side of the Conemaugh, and the steamers being on crossing courses involving risk of collision.

Rules 19 and 23 Rev. Stat., Sec. 2233.

4. For not paying attention to, or answering the signals of the Conemaugh, thereby violating pilot rules II., III. and VI., prescribed by the supervising inspectors.

I.

THE NEW YORK WAS GROSSLY IN FAULT FOR NOT MAINTAINING A PROPER AND SUFFICIENT LOOK-OUT.

The fact that the New York did not maintain such a lookout is clearly established by the admissions contained in her answer and in her cross libel. It was a clear, starlight night. There was no fog or mist to obscure or render navigation difficult. Objects on one side of the river were visible to persons on the other side. A vessel, if without lights, could be seen at a distance of a least half a mile.

CAPTAIN POWRIE, the master of the Burlington, testifies as follows (Rec., 67):

Q. What was the condition of the atmosphere at that time?

A. I think it was starlight overhead, a clear, dark night. The moon hadn't come up; there was a little smoke up around town. There was some in the river; not a great deal.

* * * * *

Q. You stated in your direct examination that you watched the Conemaugh very closely when you signaled her two whistles?

A. Yes, sir, I did.

Q. It was dark; you could not see anything of [but] her lights, could you?

A. No; I could make out she was a steamer.

Q. Of course the masthead and side lights would indicate that to you?

A. Yes, sir.

Q. You could not see the body of the boat swing in the water, could you?

A. Oh, yes; we could see the boat's hull plain enough to know that it was a boat all right; we could not distinguish a man walking on the deck, or what color she was painted; and putting her wheel hard astarboard, as I judge she did, she came around there mighty lively by the shape of her colored lights.

Q. You told that by the lights?

A. Well, not exactly. By the lights *and the boat, too.*

Q. It was light enough so you see the boat turn around?

A. Yes, sir.

Q. * * * It was so light you could see the [her] athwartships of the stream standing off the Canadian shore?

A. Yes, sir.

Q. You didn't hear her checking whistle, but you saw her check?

A. Well, I believe I stated that; I would not take my oath that I heard the whistle, still I felt pretty certain I heard it; at any rate I saw the boat slack her speed.

Q. What did you see that led you to believe she was checked?

A. I saw the boat go slower.

Q. You noticed a difference in her speed?

A. I certainly did; no mistake about that.

* * *

Q. I want to know what you saw that indicated to you that the boat had slacked up its speed that night after the boats were out of your sight?

A. You want to know what I saw that made me think the boat slacked her speed?

Q. Yes, sir.

A. I have already said I saw the hull of the boat, not to distinguish anything aboard of her, but enough to tell it was a boat's hull and that she was going down the river pretty lively; so lively I thought she had made the turn over towards Canada.

* * *

Q. From where you were could you see the barges plainly?

A. Not very plainly.

Q. Could you see the Conemaugh plainly?

A. Not plainly, no, sir; it was a boat, and what she was doing; that, together with my knowledge of the whistles, and I saw the man put his wheel to starboard and it made me know what she was about.

Rec., pp. 68, 69, 70, 71.

Captain Powrie is a disinterested witness. His testimony is entitled to credit. The respondent's witnesses were in court and heard him testify. They could have been called to contradict him if what he testified to was not true. He is corroborated by other witnesses, and it is fully shown that there was nothing to prevent the men on the New York from seeing the Conemaugh, her hull as well as her lights, or from hearing her signals, and from seeing what was her course and the danger which the vessels were running into. The fact that they did

not hear the signals of the Conemaugh nor see that vessel herself, nor see her lights, is admitted by the answer and is sufficient to establish the fact that no proper lookout was maintained on the New York, or that her officers were entirely reckless in the navigation of their vessel. The language of the District Judge, who heard the witnesses testify, and which I here quote, must commend itself to this court:

> "The admitted facts that her officers did not even "hear the first two signals of the Conemaugh, and, "though their attention was challenged to her by "her third whistle, did not see her until the alarm "whistles were sounded when the vessels were "scarcely a quarter of a mile apart, although the "weather was favorable to sight and hearing, and the "conditions of the locality called for careful navi- "gation, are conclusive that her master, and look- "out, if she had one, were either incompetent or "grossly negligent of their duties. If her lookout "saw and reported the lights of the Conemaugh, "his exoneration makes the conduct of the master "or other officer of the deck in disregarding that "warning, more reprehensible. The Conemaugh's "whistle was loud and coarse, and her lights law- "fully placed and burning. Nothing can palliate "the negligence which failed to notice either. If "the master was at his post or giving attention to "his duties, he should have heard or seen the de- "scending steamer despite the negligence or even "the want of a lookout; for the lights were seen and "the signals heard by the crews of the Burlington "and her barges, and by persons at the coal dock, "who were at a greater distance from the Cone- "maugh than the New York."
>
> 53 Fed., 553.

Under the circumstances, the New York was fairly called upon to explain why she did not see the Conemaugh's lights or hear her signals. The men who com-

posed her watch were present at the trial in the District Court. They heard the testimony on the part of the Conemaugh. They knew what was charged against them. They knew, and the counsel who represented the owners of the New York must have known whether the signals and lights of the Conemaugh were disregarded, or whether they did not hear the one or see the other. And we submit *that the withholding of the testimony of the officers and crew of the New York, under the circumstances, creates a presumption that, had these men been permitted to testify, their testimony would have shown that the New York was in fault for the collision.*

The respondent was called upon by the strongest consideration if innocent of fault for this collision, to bring to the support of its defense the evidence that it had under its control. It is well settled "that to withhold testimony which is within the power of the party to produce, to rebut a charge made against him, is to be regarded as fatal as positive testimony in support of the confirmation of the charge"

Clifton vs. U. S., 4 How., 422-426.
Gulf, Sea & S. F. Ry. Co. vs. Ellis, 54 Fed., 48.

The withholding of the testimony of the officers and crew of the New York, under the circumstances, should be regarded as a *confession of fault* on the part of the New York, for which she should be condemned.

The general rule which requires parties to present in courts of justice the best evidence in their power, makes every intendment against them when such evidence is withheld.

Wolf vs. The Vanderland, 18 Fed., 726.

In cases of collision, the solution of which is doubtful because of conflicting testimony, if it appear that an im-

portant witness is not called, the doubt will be resolved against the vessel on which he was engaged.

The Fred M. Laurence, 15 Fed., 635.

> "A party being apprised of evidence and having "the means of explanation in his power, and does "not make it, the strongest presumption arises that "the charge or claim is well founded. It will be "contrary to all experience of human nature and "conduct to come to any other conclusion."

Starkie on Evidence, 817.

We submit that it is impossible to avoid the conclusion that there was either such a want of a proper lookout, or such recklessness on the part of the persons navigating the New York, as caused or contributed to the disaster; and therefore the New York should be held in fault.

The rule which requires a proper lookout to be kept is so familiar and is of such universal application that it requires little argument to support it in this case. It was a part of the common law of the sea before it was declared by legislative enactment. It is a rule of good sense and common precaution. Its existence was recognized and the duty which it creates was formulated by Art. 20 of the Sailing Rules of 1864, which declares that,

> "Nothing in these rules shall exonerate any ship or the owner or master thereof from the consequences of any neglect to carry lights or signals, or any neglect to keep a lookout, or neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case."

The duty to maintain a lookout and to use every precaution in the navigation of a steamer upon a great thoroughfare of commerce like the Detroit River, is a *legal*

duty, as binding and as imperative as any regulation prescribed by legislative enactment.

MARSDEN ON COLLISIONS, 495, speaking of Art. 20, says:

> "It seems difficult to attribute to it any legal effect. It was inserted in the regulations probably ex abundante cautela, and as a declaration, not to be overlooked by seamen, of the legal consequences of negligence."

The Elizabeth Jones, 112 U. S., 514-523.
The Farragut, 10 Wal., 334.
The Sunnyside, 91 U. S., 208.
The Schmidt and the Reading, 43 Fed., 815.
The Agnes Manning, 44 Fed., 110.
The Nessmore, 50 Fed., 616.

The neglect to maintain a proper lookout, under the circumstances, was the omission of a *legal duty* on the part of the New York and brings her within the familiar rule that "the omission of a known legal duty is such strong evidence of carelessness that the offending vessel must be held altogether in fault, unless clear and indisputable evidence establishes the contrary."

Taylor vs. Harwood, Taney Decisions, 444.

The rule with respect to lookout having been violated by the New York, she must be held to have been in fault, unless it be established by clear proof, not only that the violation of the rule probably did not, but that it *could not have contributed to the collision.*

The Richelieu Nav. Co. vs. Boston Mar. Ins. Co., 136 U. S., 408.
The Pennsylvania, 19 Wall., 125.

The fault of the New York was not merely of a technical character. It was an actual fault, which clearly con-

tributed to the collision. This appears when we consider the relative positions of the Conemaugh and the New York, and the Burlington and her tow at the time the various signals were given. The Burlington had rounded to so as to exhibit her green light to the Conemaugh. Her tow stretched across the river in a circular shape with a narrow channel between the stern barges and the Canadian shore, which the Circuit Court of Appeals found was only about 500 feet wide. (Rec., p. 279.) The Conemaugh was then about three-quarters of a mile above the Burlington and was showing both of her lights to the Burlington. While they were in that position, the Burlington sounded two distinct blasts of her whistle to the Conemaugh, indicating that she should pass not only to the starboard of the Burlington, but to the starboard of her tow as well. In other words, that she should pass between the barges and the Canadian shore. To this signal the Conemaugh responded with two blasts and thereby entered into "a proper" agreement and understanding with the Burlington that she would pass between the barges and the Canadian shore; and in accordance with these signals and agreement, she starboarded her wheel with the purpose and intention of directing her course accordingly.

The New York was much nearer to the Burlington when the latter signaled the Conemaugh, than she was when the signals were exchanged between herself and the Burlington, and the watch of the New York knew, or ought to have known, from those signals, that the Conemaugh would pass the tow in accordance with her signals, and would direct her course to the "narrow strip" or channel between the barges and the Canadian shore. If there was any room for doubt that such would be the course of the Conemaugh, that doubt ought to have vanished when the Conemaugh starboarded, and when she

sounded her signal of two blasts to the New York. And the men on the New York, if they had not been negligent, could easily have seen that such was the Conemaugh's course, and that she intended to pass down between the barges and the shore. As the two steamers were on crossing or "slanting" courses it was evidently a dangerous thing for them to attempt to meet and pass in the narrow channel between the barges and the Canadian shore, and it was the duty of the New York to exercise the greatest care and vigilance under the circumstances. It may indeed be argued that as she heard this bargain made between the Conemaugh and the Burlington, and as she saw, or ought to have seen, the Conemaugh shape her course for the purpose of passing the barges in accordance with the bargain, she ought not only to have anticipated the probability of collision, but that as the Conemaugh was the descending vessel, she would have the right of way through this narrow channel, and that it was the duty of the New York to have checked or stopped, or have taken some other means to keep out of the way of the Conemaugh. And it may also be claimed, that having heard the signals exchanged between the Burlington and the Conemaugh, and having seen the Conemaugh shape her course in accordance therewith, the New York is to be considered as assenting to the arrangement thus made, and that she is estopped to insist that the Conemaugh was in fault for taking the course which she did take.

It is no answer for the appellant to say that the New York had the right of way, and that the Conemaugh was pursuing a dangerous course which was likely to involve the steamers in collision; for if this be true the New York was bound to guard against the impending disaster by every possible means within her power. It must have been evident to the men on the New York, if they were

not grossly negligent of their duty, that the vessels could not shape their courses for the Canadian shore and attempt to pass each other in this "narrow strip" or channel, between the shore and the barges, or between the shore and the course of the barges, without danger of colliding.

As we have already stated, the movements of the Conemaugh were visible to Powerie, the captain of the Burlington, who says he could see the hull of the boat and the course which she was pursuing, and could tell when she checked her speed.

Rec., pp. 68, 69, 70, 72, 75, 77.

See also the

Testimony of Harry P. Linderman, 1' 6, 198.
Dory Linderman, 166, 168.

If the channel between the tow & the shore was only

As suggested, the men on the New York ought to have known that the two steamers were likely to meet in a dangerous place. They ought to have known that the course of the Conemaugh would take her across the bows of the New York. For the New York to continue on her course with unabated speed, reckless of the impending danger, without a lookout, without giving or answering a signal, and without making any effort whatever to avoid a collision until all efforts were useless, shows that she was guilty to a degree which was gross and criminal.

If we concede that the New York had the right of way, this would not relieve her of the duty to maintain a lookout. The right of a vessel to keep her course under Rule 23 does not dispense with this obligation.

But for the presence of the Burlington and her tow the case might have fallen directly under Rule 19, but it may be well claimed that the presence of the Burlington and her tow, together with the fact that the Conemaugh was the descending vessel, was a *special circumstance* which

modifies what would otherwise have been the rights and the duties of the New York and the Conemaugh, by bringing the case within Rule 24, which declares that:

> "In construing and obeying these rules, due regard must be had to any special circumstance which may exist in any particular case, rendering a departure from them necessary to avoid immediate danger."

It will be observed that the right of the New York to keep her course under Rule 23 is expressly declared to be "subject to the qualifications of Rule 24." If we adopt in favor of the New York the most favorable view which can be taken of the testimony, it is evident that these steamers were not only "crossing so as to involve risk of collision," but that they were *approaching* each other so as to involve the risk of collision, and that it was the imperative duty of both to slacken speed, and if necessary stop and reverse. The New York, therefore, was guilty of a direct violation of Rule 21; and even if we concede that she had the right of way, and that it was primarily the duty of the Conemaugh to keep out of the way, the New York was also guilty of a violation of Rule 24.

MARSDEN ON COLLISIONS, 475, says:

> "The rule that a ship is to keep her course does not mean that she is to do so obstinately when she sees that, under the peculiar circumstances of the case she can, by departing from it, avoid a collision."

At page 485 it is said:

> "Not only is departure from the rule of the road excused by Art. 23, where the rule cannot be obeyed without a collision, but a literal observance of the regulations cannot be set up as a defense where the collision might have been avoided by ordinary care. When one person neglects his duty, and so puts another into danger, the second is not

justified in doing nothing to avert that danger, though it is caused entirely by the fault of the first. You may depart, and you must depart from a rule, if you see with perfect clearness, almost amounting to certainty, that adhering to the rule will bring about a collision, and violating a rule will avoid it; and, indeed, this is provided for by the 19th Art."

The right of a steamer having another on her port side, their respective courses being converging or crossing, to keep her course, is no greater than the right of a sailing vessel to keep her course when meeting a steamer. Yet in the *Sunnyside, 91 U. S., 208*, a bark was held in fault for a collision with a steam-tug which had full steam on, and which was exhibiting the colored lights of a steamer in motion, although the bark kept steadily on her course until the collision was inevitable. In that case, when the tug was about two miles distant, the lookout of the bark discovered and reported her lights to the mate, who came forward and observed them, and seeing that it was a steamer supposed she would take care of herself, and then returned aft to look after other lights. No further observation or report of the tug was made until just before the collision. The court say:

"Indifference in respect to an approaching light such as was manifested by the mate was not calculated to induce much vigilance on the part of the lookout. * * * Negligence more manifest, culpable or indefensible in view of the circumstances, is seldom exhibited in controversies of this character; and the only excuse offered for it is, that the eighteenth sailing rule provides, that where one of two ships is required to keep out of the way, the other shall keep her course; entirely overlooking the fact that the mandate of that rule is declared by the rule itself to be subject to the qualification, that, in obeying and construing the rule, due regard must be had to all dangers of naviga-

tion and to any special circumstances which may exist in any particular case, rendering a departure from the rule necessary in order to avoid immediate danger."

"Years before the Act of Congress referred to was passed, this court promulgated the doctrine, that rules of navigation are adopted to prevent collisions, and to save life and property at sea, and not to promote disasters; and decided that the neglect of one of two approaching vessels to show the signal-lights required by law did not vary the obligations of the other to observe the rules of navigation, and to adopt all such reasonable and necessary precautions to prevent collision as the circumstances in which she was placed gave her the opportunity to employ. * * * Culpable misconception as to his duty on the part of the mate, and inattention and carelessness on the part of the lookout, induced, perhaps, by the remarks of the mate, 'that it was a steamer, and that she would take care of herself,' was the primary causes of the neglect and omission of duty which led to the collision. * * * Cases arise in navigation where a stubborn adherence to a general rule is a culpable fault, for the reason that every navigator ought to know that rules of navigation are ordained, not to promote collisions, but to save life and property by preventing such disasters."

If, in the case quoted, it was the duty of the Sunnyside, a sailing vessel, having the rgiht of way, to maintain a vigilant lookout and to depart from the rule which requires a sailing vessel when meeting a steamer to hold her course, much more was it the duty of the New York to be watchful and vigilant, and to stop or check or adopt some other precaution to avoid colliding with the Conemaugh. "Reasonable care and vigilance," would have enabled the men on the New York to have discovered the presence of the Conemaugh and what her course and movements were. If the Sunnyside was in fault on account of a want of attention and vigilance on the part of

her lookout, what shall be said of the lookout on the New York? If reasonable care and attention would have enabled the men on the Sunnyside to have discovered that the tug was not going to get out of her way, like care and attention would have enabled the New York to discover her danger from the Conemaugh, and to have taken necessary precautions to avoid collision. Under the rule laid down by this court in the Sunnyside, it is impossible for the New York to escape condemnation.

The right of a vessel to keep her course does not relieve her from the obligation to maintain a careful lookout.

The *Chicago, 61 Fed., 521*, was a collision between a ferry boat and a tug in which the former was held in fault for failing to keep a proper lookout and to observe the attempt of the tug to cross her bow, in time to reverse. The court say:

> "Even if she got a reply of two whistles from the tug, and had a right to expect that the tug would go under her stern, in accordance with that signal, she was not thereby absolved from the duty of attention to the movements of the tug until she got so near that collision was inevitable. Misunderstanding of signals is not infrequent; the execution of intentions is sometimes interrupted, or thwarted by new circumstances. The necessity and the duty to maintain a lookout continue the same."

See the Franconia, 3 Fed., 397.
The Gladiator, 41 Fed., 927.
The Clara, 51 Fed., 1021.
The Eagle, 69 Fed., 157.

II.

THE NEW YORK WAS ALSO IN FAULT FOR VIOLATING RULE 21, WHICH REGUIRES THAT:

> "Every steamer when approaching another vessel so as to involve risk of collision, shall slacken her speed, or if necessary, stop and reverse."

This rule is imperative; it has no exceptions. It applies to every steamer which is approaching another vessel so as to involve risk of collision. No matter what their respective courses may be, or which of two steamers has the right of way if they are approaching—i. e., if they are drawing near to each other so as *to involve risk of collision* —so that there is a probability that they may collide, then both steamers should obey the rule.

It is plain that the New York and the Conemaugh were approaching each other so as to involve risk of collision, and such is the statement contained in the opinion of the Circuit Court of Appeals where it said:

> "It is not disputed that the courses of the two "vessels were crossing *so as to involve risk of colli-* "*sion*, and that the Conemaugh had the New York "on her own starboard side."
>
> Rec., p. 278.

This statement is fully justified by the pleadings and by the evidence in the case. That the New York did not comply with the rule must be admitted. The answer states that when the Conemaugh sounded her alarm the steamers were not more than 100 feet apart, and that the collision was then *inevitable*. In the court below counsel for the New York conceded that up to that time the speed of the New York was ten miles an hour, and that

the steamers were approaching each other at the combined speed of 666 feet in thirty seconds; the speed of the New York being 440 feet in thirty seconds. No attempt was made on her part to slacken speed or stop and reverse. Her guilt in this respect is self-confessed.

THE C. H. SEUFF, 32 FED., 237, was a case of collision between the Pavonia and the Seuff when on crossing courses, the Seuff having the Pavonia on her starboard side. The Pavonia was held in fault for not stopping and backing, although she had the right of way. The Court says:

> "The courses of the two vessels were clearly "crossing and the continued absence of the Seuff's "red light from sight when the boats had ap- "proached within a quarter of a mile of each other, "it seems to me, was such clear evidence of a 'risk "of collision' as made it obligatory upon the ferry "boat to stop and back under the twenty-first rule. "Though the Pavonia might keep her course she "was not absolved from backing as required by "that rule and by Rule 24, when that became neces- "sary in order to avoid collision."

IN THE AMERICA, 32 FED., 845, a steamer having the right of way was also found in fault for not stopping and backing. The Court say:

> "When he (the America's pilot) saw that the Talisman was crossing his bows, although he had the right of way, it was his duty to reverse at once in order to avoid collision; because he knew that from that moment there was clear risk of collision and a reversal was necessary."

THE BALTIMORE, 34 FED., 660, was a similar case in which the Court said:

> "As respects the Baltimore, the case is similar to many others, in which, notwithstanding the primary fault is that of the vessel bound to keep out of

> the way, the other vessel is also held in fault for not stopping and backing as soon as the purpose of the former vessel to go ahead was clear, and when it was manifest that the other could no longer, by her own efforts, avoid collision. So long as the vessel bound to keep out of the way has clearly time and space enough to do so, *and there are no certain indications of any contrary intent*, the other vessel has a right to presume that the former will do her duty, and is not bound, under Rule 21, to stop and reverse. When that limit is passed, Rule 21 requires immediate stopping, and reversing, if necessary, to avoid collision."

If we assume that it was the duty of the Conemaugh to keep out of the way of the New York, still her thrice repeated signals of two blasts each, and the exhibition of her green light were *clear and certain indications of a contrary intent* which the New York should have regarded.

IN THE AURANIA AND THE REPUBLIC, 29 FED., 98-124, Judge Brown said:

> "Even, therefore, if the Republic had the right "of way, it would have been her duty, being the "steamer astern, and the intent of the other to go "ahead being clear, to slacken speed at once, or "stop if necessary. Having the right of way does "not dispense with the seventeenth [21 rule], nor "supersede the obligation to stop when actual risk "of collision is impending. This is settled by the "English decisions and by many decisions in this "country." Citing the America, 92 U. S., 432-438; The Sunnyside, 91 U. S., 218.
>
> See also the Columbia, 25 Fed., 844.

It was suggested, and the Circuit Court of Appeals seems to have adopted the suggestion in its opinion, (Rec., p. 285) that the New York was justified in maintaining her speed under the decision in the *Brittania,, 153 U. S., 130;*

and *the Delaware*, 161 U. S., 459. We submit, however, that a careful examination of the facts in those cases show that they have no application to the case at bar.

In the *Brittania* it is clear that both steamers maintained a proper lookout and were moving at reduced speed, which cannot be said of the New York. The Brittania had the Beaconsfield on her starboard side. The Beaconsfield signaled the Brittania to pass on her starboard side. The Brittania signaled her assent, and it was "evident that the pilots of both vessels agreed in the fact that the proper thing to avoid a collision was for he Brittania to swing to starboard and pass behind the Beaconsfield." But as the Brittania did not seem to swing to starboard in accordance with the signals that were exchanged, the Beaconsfield blew another whistle, which again signified her expectation that the Brittania would pass under her stern, and then "put her wheel hard aport, and stopped her engines and reversed at full speed." After her headway was overcome her engines were stopped and she lay still in the water about a minute and a half and until the collision. If she had not stopped and backed, the Brittania would have passed a short distance astern of her in accordance with the signals. The Court found that the apparent delay of the Brittania in changing her course to starboard according to the signals which had been exchanged, was due to a current or eddy in which she found herself, and that the Beaconsfield was to blame for "overlooking the effect of such current in delaying the movements of the Brittania to starboard. The course of the Brittania was precisely what might have been anticipated * * * and did not * * * warrant the Beaconsfield in disregarding the injunctions of the 23d rule, which, if obeyed, would have prevented the collision." The Beaconsfield was also held in fault "in remaining motionless for a minute and a half

in full view of the direct actions of the Brittania in going astern." The decision of the court is thus summarized at p. 141:

> "This disregard by the Beaconsfield of the Brittania's signal and her failure to obey the rule and keep her course, her supine negligence in remaining motionless for so long a period while she saw the Brittania approaching her, clearly put her in fault."

That the court did not intend to decide that a steamer which has the right of way is to keep her course and go ahead with unabated speed, regardless of any other duty, is apparent from what is said in the opinion at page 142:

> "The collocation of the rule and its direct reference to Rules 17, 19, 20 and 22, plainly point to the meaning that, while the other vessel must keep out of the way, the preferred vessel shall not interfere with or thwart the movements of such other vessel by bringing a new element into the calculation, which would be done, if, instead of pursuing her course, she stopped her headway. It is not meant that some exigency or obvious danger might not justify her in checking her speed, and even in stopping altogether. But such a case is provided for in the twenty-fourth rule. As we have seen, no such exigency is found to have existed in the present case."

At p. 137 the Court says:

> "The nineteenth rule is as follows: 'If two vessels under steam are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.' We do not understand this rule to signify, as the Circuit Judge seems to have thought, that the Brittania was at all hazards, and in some way or other, to avoid the Beaconsfield. Such a rendering of the rule would dispense with all inquiry beyond the single one, which vessel had the other on her starboard side. The plain meaning

of the rule was first applied to the situation under consideration, that the Brittania, which had the Beaconsfield on her starboard side, should yield the path to the latter, and pass behind her. This reading of the rule was recognized and complied with in the first instance by the pilots of both vessels in signalling each other that the Brittania should go astern."

In the Brittania the Court affirmed the decision of the District Judge, who said:

> "It is to be observed, first, that none of these rules are to be taken absolutely or independently of the rest. They are to be construed and applied together with reference to each other and to their common design, viz, to prevent collision. Hence, when observance of a rule would plainly tend to bring about a collision, which a departure from the rule would avoid, departure becomes a duty."

In the Delaware this court said:

> "The case of the Brittania, 153 U. S., and the Northfield, 154 U. S., 629, must be regarded, as settling the law that the preferred steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her by porting, at least *in the absence of some distinct indication that she is about to fail in her duty.*"

Assuming that it was the duty of the Conemaugh to keep out of the way of the New York, we still insist that there were "distinct indications" that she was about to fail in her duty.

1. The exhibition of her green light to the New York, together with her thrice repeated signals of two blasts each, were a distinct announcement, "in the language of the sea," that she intended to cross the course of the New York.

2. As expressly found by the Court of Appeals (Rec., p. 281):

> *"The Conemaugh, being where she was, was either in or dangerously near the course of the New York, and was not keeping out of the way."*

We submit that in view of the narrowness of the channel between the course of the Burlington's tow, and the Canadian shore, the probability that the steamers would meet in that channel, in view of the signals sounded by the Conemaugh and the exhibition of her green light, it was clearly the duty of the New York to check her speed, or, if necessary, stop and reverse. Had she done so the collision would have been avoided.

> The Friezland, 76 Fed., 591.
> The City of Chester, 78 Fed., 186.
> The Louise, 52 Fed., 885.
> The Grand Republic, 16 Fed., 424.
> The Memnon, 6 Asp. Mar. Cas., 317.

In this connection we quote what was said in the case of the *Milwaukee, Brown's Admr.*, 330, a case which has often been cited with approval.

> "It was claimed that the obligation to check did not attach to the Lac la Belle, because but for the mistake of the Milwaukee in starboarding when she ought to have ported, there was no danger of collision. That the Lac la Belle had a right to assume that the Milwaukee would obey the law, and if she had done so there would have been no collision, notwithstanding the excessive speed complained of. This doctrine, carried to its ultimate results, would avoid all rules having for their object the enforcement of precautionary measures for preventing collisions, and would recognize the right of a vessel, herself technically obeying the rules, unnecessarily to run another down, which, accidentally or otherwise, might come in her way in consequence of some non-observance of those rules, neither of which results would for a moment

be recognized as law by the learned advocates who advanced the doctrine stated."

The Court of Appeals excused the New York for her failure to maintain a proper lookout upon the ground that, as the Conemaugh received no answering signal from the New York, it was her duty to keep to the port of the New York and pass on that side.

The Court in its opinion says:

> "Again, how did the New York's failure to see the Conemaugh contribute to the collision? Suppose the New York's lookout had seen every maneuver of the Conemaugh, would her course have been different from what it was? We do not think so. She had the right to maintain her course, and that we have found she did. She would have had no right to infer that the Conemaugh would suddenly cross her bows, however alert her watch. She would have been justified in supposing that the Conemaugh, not having established an agreement to pass starboard to starboard would maintain her bearing to the port of the New York and swing clear on that side. Especially is this the case when, if she had seen the Conemaugh, she would have observed her swinging slowly to the port of the New York in the wake of the barges in the tow, although blowing signals of her intention, if assented to, to change her course to the starboard of the New York."

Again it is said in the opinion:

> "The only risk of collision would have been in the Conemaugh's failure to keep to port, and this failure she was not bound to anticipate."

Rec., p. 285.

The statement that the Conemaugh was "bearing to the port of the New York," and that she was following in the wake of the barges, is, we submit, inconsistent with the fact, which the opinion says "is not disputed," "that

the courses of the two vessels were *crossing* so as *to involve risk of collision*, and that the Conemaugh had the New York on her own starboard side." Now the courses could not be crossing so as to involve risk of collision, and the Conemaugh could not have the New York on her own starboard side if the Conemaugh was "bearing to the port of the New York."

The conclusion of the Court of Appeals is also inconsistent with the fact which is stated in the opinion (Rec., 281), that

> "The Conemaugh, therefore, being where she was, was either in or dangerously near the course of the New York, *and was not keeping out of the way.*"

It is also inconsistent with the other facts stated in the opinion (Rec., p. 282) that

> "The New York was proceeding from the American side in a slanting direction across the river, while the Conemaugh was proceeding down the river in a slanting direction, and each must have been showing to the other but one light."

Now if the vessels were on these "slanting" courses, the New York must have been showing to the Conemaugh her red light, and the Conemaugh must have been showing to the New York her green light, unless, indeed, the course of the Conemaugh was such that it would have taken her across and under the stern of the New York, which nobody pretends was the fact.

These conclusions of the learned Court, we submit, are also inconsistent with the case stated in the libel filed by the owners of the Conemaugh, and in the answer and cross-libel filed by the owners of the New York.

The libel distinctly avers that the Conemaugh was proceeding on a course which would cross the New York's course, and that she notified the New York by her two-blast signals that she was so directing her course "as to

go well in on the Canadian shore and leave the tow and the New York to starboard, as she should come abreast of them respectively." (Rec., p. 2.) The answer avers "that while passing under the stern of (the last) barge * * * several short blasts of a propeller, which afterwards proved to be the Conemaugh, were heard close at hand and not more than 100 feet away. The Conemaugh *pursued her course directly across the bows of the New York.* A collision was then inevitable, and there was neither time nor room enough to stop the engine of the New York. * * * The Conemaugh, with considerable headway, *continued on her course across the bows of the New York,* so that the latter was struck stem on," etc.

Rec., pp. 9-10.

The cross libel contains substantially the same averments. The answer, of course, was prepared by counsel from information furnished by the men who were on the New York. The language used is entirely plain and unambiguous. It is a clear, direct statement that the course of the Conemaugh lay directly across the course of the New York, and that when the several short blasts which constituted a signal of alarm was sounded by the Conemaugh, she was then *pursuing*, or keeping on her course; and that she *continued* on the same course across the bows of the New York until the collision was inevitable, and until the New York struck her stem on. There is no intimation in the answer or cross-libel that the Conemaugh was thrown across the bows of the New York by any sudden starboarding or change of course on her part. On the contrary, the answer and cross-libel are only consistent with the fact that the course of the Conemaugh was such that she was *never* bearing to the port of the New York, but that it was *always* across the wake of the barges, and *across* the bows of the New York.

In reaching its conclusion the Court of Appeals must clearly have misapprehended the testimony in the case; for we submit that the conclusion is inconsistent with the undisputed testimony.

It is true that after starboarding in compliance with the signals which were exchanged with the Burlington, the Conemaugh ported. But notwithstanding such porting, her course was at an angle of about forty-five degrees, or four points with a line drawn directly across the river; so that the steamers were approaching each other at an angle of about six points, and not on courses nearly parallel, as they must have been if the Conemaugh was following in the wake of the barges; the finding of the Court of Appeals being that the New York's course was about parallel with that of the last two barges.

CAPTAIN MILLER, the master of the Conemaugh, says that she headed with reference to the Canadian shore a trifle down steam—less than forty-five degrees from right square across.

Rec., p. 18.

KELLY, the wheelsman, says that after porting he *steadied;* and that they were then "slanting down about two or three points from straight across."

Rec., 111-112.

On cross-examination, he says:

Q. The next thing you got was an order to port a little?

A. Yes, sir.

Q. Then your boat blowed?

A. No, she didn't blow yet.

Q. Then what next order did you get at that time?

A. Port a *little;* follow the tow around.

Q. Did you port a *little?*

A. Yes, sir.

Q. Did you then get an order to steady?

A. Why, yes; after she came around and got *slanted* down the river he says steady. * * *

Q. As I understand you, after you had ported and *steadied*, you were heading about two or three points off a course directly across the river.

A. Yes, sir. On a slant across the river, a little down.

Q. And you *kept* on that course until you got the order to starboard?

A. *That is what I done.*

Q. And then you got the order hard-a-starboard?

A. That is what. * * * And for the first time I saw the New York * * * about two or three boats' lengths from us; as I said before, like she was coming straight for us. * * * She was heading right for us.

Rec., pp. 114-115-116.

HOGAN, the second mate, who was in the pilot-house assisting at the wheel, testifies:

Q. Now, Mr. Hogan, how much did your vessel port in your best judgment, we will say from heading directly across the stream?

A. Well, I should say somewheres between *three and four points*, * * * and then she *steadied;* and the next order was hard astarboard.

Rec., pp. 139, 140, 141.

"Under that final starboarding our vessel probably swung a point and a half or two points."

Rec., pp. 140-141.

On his cross-examination he says:

Q. When did you get the order to port. I will read

your language: "The captain said, do you see the stern of that tow? I said I did, and the wheelsman answered something, and the captain said, port and follow." You heard that conversation?

A. Yes.

Q. Was that before or after you blew the third blast of two whistles?

A. It was before.

Q. Did you port and follow them when the captain told you to?

A. Yes, sir.

Q. How much did your boat swing under that porting?

A. *Somewhere between three and four points.*

Q. How was she heading with reference to athwartships of the stream then; how many points down stream?

A. *Oh, probably about three points.*

* * * * *

Q. When you reached that position did you receive an order to steady; or did you steady without an order?

A. No, sir;

Q. Did you steady her?

A. The wheelsman steadied her. I was not handling the wheel. *She was steadied; I saw her steadied.*

Q. Then you looked out and saw the red light of the steamboat below? Is that right?

A. Yes, sir.

(The witness then placed the models to indicate the position and courses of the two vessels, which unfortunately has not been preserved.) His testimony proceeds:

Q. Could you then see between the tail end of the tow and the Canadian shore?

A. Yes, sir; not directly down the river. I don't know as I could at that time.

Q. The Conemaugh had not gotten under the stern of the rear barge at that time?

A. No, sir.

Q. It was before the Conemaugh got to the stern of the rear barge that she blew the third blast or two whistles?

A. Yes, sir.

Q. And the boats were then in about the position below as you have placed them?

A. Yes, sir.

Q. With the New York between the second and third barges from the tail end of the tow?

A. Yes, sir.

Q. Showing her masthead and red light?

A. Yes, sir.

Q. Could you tell how she was heading?

A. Well, by the lights she was showing, she was heading over towards the Canadian shore.

* * * *

Q. You then blew the third blast of two whistles?

A. That was when she was about where she is now. (Referring to models.)

Q. Then the Conemaugh stood *on under a steadied* helm, did she?

A. *Yes, sir;* for a little while.

Q. And across the line of the tow?

A. No, sir; that was when she was in this position, I should judge.

Q. Now, when they were in that position you blew the alarm signal?

A. No, sir; that is the position they were in when he blew the last two whistles.

Q. Standing down with *a steady helm?*

A. *Yes, sir.*

Q. And *continued to stand with a steady helm* for a short time, and blew an alarm signal?

A. *Yes, sir.*

Q. And when you blew the alarm, you had cut (crossed) the line of the tow, had you, so you could look down the port side of the last barge?

A. Yes, sir; but we were not as close to the tow as that though.

Q. When you blew the alarm, then you had cut the course of the tail end of the tow, and could look down the port side?

A. Yes, sir.

Q. And you swung, * * * you blew the alarm and put your helm hard starboard?

A. Yes, sir.

Q. *And you swung about a point and a half, you think, before she struck?*

A. *Didn't swing as much as that.*

Q. How much did she swing?

A. (Placing models) That is the position she was in when she struck.

Q. You didn't strike—you didn't swing at all under that hard starboard, did you?

A. Yes, sir; she swung *some.*

Q. A point?

A. *Probably* that.

Q. *About a point?*

A. *Yes, sir; from that to a point and a half.*

Q. She didn't swing six points?

A. *No, sir; she didn't swing more than a point and a half;* somewheres in that neighborhood.

* * * * *

Q. She struck you at an angle of seven points you think? Seven points on the starboard bow?

A. Yes, sir; pretty near. Call it that.

Rec., pp. 147-148-149.

Now, if the Conemaugh instead of crossing the wake of the tow, was following along in it, for an appreciable time while she was blowing her signals as stated in the opinion of the Court of Appeals (Rec., p. 282), the New York could not have struck her on the starboard bow at an angle of seven points (almost a right angle), if she swung only a point or a point and a half after sounding the alarm signal. If she was following in the wake of the tow when she was sounding her signals, her course must have been nearly parallel with the course of the New York; and it was impossible, by any starboarding of her wheel, to change her course to one nearly at right angles with the course of the New York; the vessels being so near together as it is conceded that they were when the order to starboard was given.

CAPTAIN MILLER, the master of the Conemaugh, was recalled and on his further cross-examination testifies:

Q. You had blown her [the New York] three sets of two whistles?

A. Yes, sir.

Q. Which indicated you were crossing her course?

A. Yes, sir.

Q. And she had not replied to you at all?

A. No.

Q. Why didn't you go down on the port side of her when you saw the boats in that position?

A. Having signified my intention, I concluded it was best policy to *hang onto the course I was on.*

Rec., p. 187.

* * * * *

Q. And the only reason you can give for not porting, and going down on her port side at the time the boats

were in the position that you have placed them, is that you had blown two whistles?

A. Yes, sir.

Q. And you thought you must *keep* the course you indicated by those whistles?

A. Yes, sir.

Q. You knew you had the right to take either side of her, didn't you?

A. I supposed I had a right to hang onto that side of her, after I had signaled my intention.

Q. You were navigating under the theory that you had the right to that side because you had whistled for that side?

A. Yes, sir.

* * * * *

Q. Did you expect him to starboard and go across the stern of that barge?

A. Under the stern of the barge; yes, sir.

Q. And leave you room to go down on his starboard side?

A. Yes, sir.

Q. You understood it was his duty to do that?

A. Yes, sir.

Q. Because you had blown him two whistles?

A. Yes, sir.

Rec., pp. 188.

* * * * *

Q. You expected when she reached the proper point, whatever it was, that she would pass on your starboard side?

A. Yes, sir.

Q. You expected that because you had blown her two whistles?

A. Yes, sir, when I was blowing those whistles almost *across* her course.

Q. *You had her on your starboard side?*

A. *Yes, sir.* (Rec., p. 190.)

The witness also testified that he was seeing both of the colored lights of the New York, and on his cross-examination he was asked:

Q. Did it occur to you that the lights were kept in view because you were *running across his course all the time?*

A. Yes, sir.

Q. That was the reason they were kept in view?

A. Yes, sir.

The testimony shows very clearly that after the porting of the Conemaugh her course was *diagonally* across the river at an angle of about three or four points with a line directly across; and that she was *steadied and kept* on that course until the vessels were so near together that collision was inevitable; and that she then starboarded, and swung about one and a half points when she was struck by the New York at nearly a right angle. The testimony fully justifies the fact stated in the opinion (Rec., p. 278), "that the courses of the two vessels were crossing so as to involve risk of collision, and that the Conemaugh had the New York on her own starboard side;" and that from the time the second blast signal was sounded by the Conemaugh to the New York, until the third blast was given, "the New York was proceeding from the American side in a slanting direction, while the Conemaugh was proceeding down the river in a slanting direction, and each must have been showing to the other but one light." (Rec., p. 282.)

The only testimony referred to by the court in its opinion to show that the Conemaugh was not crossing the wake of the barges, but was following along in it for an appreciable time while sounding her signals, is that of

the masters of the two last barges, who, it is stated in the opinion, say, that "for some time before the third signal blast they saw both of the side lights of the Conemaugh."

With deference, we submit that the court has misapprehended their testimony.

CAPTAIN JEANS, of the Amaranth (Rec., p. 87), testifies as follows:

* * * Q. What did you see of the Conemaugh?

A. When I first noticed her she was coming down the river; I thought he was a little in the center of the river, a little more on the American side; and I saw him after we began to turn around, starboard his wheel; I thought he was going under our stern. I watched him closely, and I saw his green and red and masthead light along until he came to sheer on the Canada side, then I lost his red light and saw his green light.

This evidently refers to what the witness saw when the Conemaugh starboarded in compliance with the signals exchanged between her and the Burlington, and opened her green light to the barges; and before she exchanged signals with the New York. By the "sheer on the Canada side," he does not refer to her hard starboarding immediately before the collision, but to her movement toward the Canada side for the purpose of passing between that shore and the tow, before she sounded her first signal to the New York. This appears from his testimony on cross-examination (Rec., pp. 91-92), where he says:

The Burlington blew first, and the Conemaugh answered with two blasts.

Q. Then what did the Conemaugh blow?

A. A few minutes after that she blew one more blast again.

Q. Had the Conemaugh then starboarded?

A. Yes, sir; he was starboarded then; going near the Canada side, I presume.

Q. Where was she when she blew to the Burlington?

A. She was pretty well up the river; I should judge between a mile and three-quarters of a mile. She starboarded a little while afterwards.

Q. Did you see her port or steady after that?

A. I saw nothing of that kind. I saw him coming, slowly starboarding his wheel.

Q. And he did not change his course at all that you could see?

A. No, sir; not where I was.

Q. Where was the last barge, or where was he with reference to the last barge when he blew the first signal to the New York?

A. I should judge the Conemaugh was then about seven or eight hundred feet from the last barge.

* * * * *

Q. Now let me understand you. You say he was seven or eight hundred feet from the last barge. On which side of the last barge was he?

A. He was right astern and going a little on the port side of her, and he was pretty well over to the Canada side.

Q. Then he was on the port side of the last barge when he blew his signal to the New York?

A. Yes, sir, he was right opposite when he blew his two whistles—right astern of her.

Q. Then he was under a starboard helm?

A. That I don't know. I was not aboard the New York. I was aboard the Amaranth. I could not tell what he was doing. I know he was heading for the Canada side of the tow.

Q. He was heading right for the Canada bank?

A. Not right plump for the Canada bank; going slantwise like.

Q. And he kept going for the Canada bank as long as you saw him?

A. Yes, sir.

See Rec., p. 92.

At p. 93, after placing the models, he further testifies that when the next whistle was blown the New York and Conemaugh were pretty close together.

Q. The New York had passed the Amaranth?

A. Yes, sir.

Q. And she was passing her on the same course she had been on before?

A. Yes, sir.

Q. So far as you know, after the New York had shown you the red light, she kept coming on a straight course down towards you?

A. Yes, sir.

Q. She made no change of course that you saw?

A. Not that I know of. As long as she was clearing me she was clearing the other barges too.

Q. And the Conemaugh made no change of course?

A. Not that I know of.

This testimony is inconsistent with the idea that the Conemaugh was following in the wake of the barges, or that she ported so as to show her red light to the master of the Amaranth, while she was sounding her signals to the New York.

CAPTAIN SMITH, of the barge Ferguson, on his cross-examination (Rec., p. 103), says:

Q. When the Conemaugh was blowing her whistles to the New York, she was on your starboard hand astern, wasn't she?

A. Yes, sir.

Q. And when she blew the alarm whistle she had got under your stern?

A. She was directly astern of me.

Q. And the collision occurred immediately after that?

A. Shortly after that.

Q. Were you looking at the vessels when they came in collision?

A. Yes, sir.

Q. What light was the Conemaugh showing you?

A. Showing a green light.

Q. Masthead light and green light were the only lights you saw?

A. Yes, sir; after she rounded the river, I saw her cabin lights.

Q. You saw at the same time the red light of the New York?

A. That is all.

Q. So that just before the vessels came in collision they were showing each other the red and the green lights; that is, the New York was showing her red light to the green light of the Conemaugh.

A. I should judge she was showing all three lights to the Conemaugh.

Q. But from your position you saw the green light of the Conemaugh and the red light of the New York?

A. Yes, sir.

Q. * * * What lights did you see at the time she blew the whistles to the Burlington?

A. I saw the red and masthead light. His port light and the masthead lights.

Q. And then what next did you see?

A. His green light.

Q. Did you see both of the Conemaugh's lights at any time?

A. Yes, sir; right after the signal I saw the three of his lights.

Q. How far was she above you in the river at that time?

A. About a quarter of a mile I should judge up the river.

Q. Was she a quarter of a mile up and over on the American side of the center of the channel; is that it?

A. Yes, sir; somewheres along that side.

Q. You say she blew the New York three separate signals of two blasts?

A. Yes, sir.

Q. And during that time she was astern of your barge and on the starboard side of you?

A. On the starboard side of me.

Q. As I understand you, it wasn't until she blew the alarm whistle that she got from under your stern?

A. She was passing across my stern.

Q. About how far was she astern of you?

A. She was three or four lengths of herself I should judge.

Thus far the testimony of Captain Smith clearly shows that the Conemaugh was not following in the wake of the barges, but was on a course diagonally across the river, intersecting the course of the barges.

It is true that at Record, p. 106, he testifies that he got a glimmer of the Conemaugh's red light, and that she appeared to be following him around. We all know how difficult it is for persons on a boat which is moving to judge of the movements of another, especially in the night time. And the testimony of Captain Smith as to getting a glimmer of the red light and as to what appeared to him to be the movements of the Conemaugh, however it may be construed, is entitled to but little weight with

respect to the heading and course of the Conemaugh, as against the positive testimony of the Conemaugh's master who was directing her movements, and the testimony of the second mate and wheelsman, ho were in the pilot-house and in charge of her wheel.

The established rule is "that the testimony of officers "and witnesses as to what was actually done on board "their own vessel is entitled to greater weight than that "of witnesses on other boats, who judge or form opinions "merely from observation."

The Alexander Folsom, 52 Fed., 411.
The Hope, 4 Fed., 89.
The Winan, 20 Fed., 248.
The Alberta, 23 Fed., 807.

If we apply this well established rule we can reach no other conclusion, than that the course of the Conemaugh up to the time she sounded her alarm whistle and hard starboarded, was diagonally across the river, and that she did not at any time follow in the course or wake of the barges; and it follows that the collision resulted while she was "pursuing" this course which took her across the bows of the New York as stated in the answer. In other words, her course all the time was substantially across the river and across the course of the New York, and that she adhered to that course as she indicated to the New York she would do by her repeated two blast signals. There is no testimony that the Conemaugh at any time exhibited her red light to the New York. On the contrary, the men on the latter steamer from first to last could have seen only the green and white lights of the Conemaugh, which with the two blast signals sounded by the Conemaugh ought to have been a sufficient indication of her determination to proceed across the bow of the New York, and to pass down on her starboard side.

If the bearing of the Conemaugh was at any time to the port of the New York, if she was at any time on a course to the port of the New York, if she at any time exhibited her red light to the New York, the fact could be easily established by the testimony of the officers and men who were on board the New York. These officers and men were present at the trial in the District Court; but they were not called as witnesses. The presumption is that if they had been called, their testimony upon this point would have shown that such was *not* the course of the Conemaugh, but that, on the contrary, she never exhibited her red light to the New York, and that her bearing was never at any time to the port of the New York, but that her course during all the time she was signaling to the New York was across the wake of the barges, and across the course of the New York.

With great respect we submit that a lookout on the New York at no time could have seen the red light of the Conemaugh, as suggested in the second opinion of the Circuit Court of Appeals, 82 Fed., 814. If any one on the New York could have seen it, or did see it, why were they not called to testify? They were present in the District Court, but they were not called to the witness stand.

Admitting that the Conemaugh was in fault in pursuing her course across the course of the New York, and for not checking or stopping, nevertheless the New York was also guilty of fault in not discovering the movement and in not heeding the warnings which she received from the Conemaugh's signals. Indeed, the more glaring the fault of the Conemaugh in this respect, the more culpable does the conduct of the New York appear.

It is clear under the facts found by the Court of Appeals that the steamers were approaching each other so as to involve risk of collision, and it was the duty of both under

the express provision of the Act of Congress, to check, or if necessary, stop and reverse.

It seems that the court must have misapprehended the testimony of the witnesses who speak of the Conemaugh porting and following the tow, and that the court was misled in respect thereto. Captain Miller, the second mate and the wheelsman, certainly use such language in their testimony; but it is common for sailors to use such expressions in describing the movements of a vessel, which in a general sense is going off toward another vessel moving on such a course as the barges were on. And when the Conemaugh's witnesses speak of "following the tow," they simply mean that their steamer, instead of continuing to head directly across the river or a little up stream, as she did for a time after starboarding, in compliance with the Burlington's signals, ported so as to cross the wake of the tow for the purpose of passing the tow in compliance with her understanding with the Burlington. This is a fair construction of their testimony, taken as a whole.

The court seems to have fallen into the error of supposing that the Conemaugh continued to swing to starboard towards the barges, and to have overlooked the fact that she ported ONLY THREE OR FOUR POINTS from a line directly across the river, "AND THEN WAS STEADIED." In other words, the court seems to have entirely overlooked the fact that "she was steadied" after she had swung only three or four points down the river, and that after so steadying no other change was made in her course until her wheel was put hard astarboard immediately before the collision. The fact that she was steadied is proved by the testimony of the master, the second mate and the wheelsman. These witnesses were uncontradicted. She never headed more than three or four points down the stream, and consequently her bearing

was never to the port of the New York, but was all the time across the bows of the New York.

III.

AS TO THE DUTY OF THE NEW YORK UNDER THE SUPERVISING INSPECTOR'S RULES TO ANSWER THE SIGNALS OF THE CONEMAUGH.

The Court of Appeals holds that the Conemaugh was bound by Rule II. to pass to the right or under the stern of the New York. If this be true, and if Rule II. was applicable to the case, then Inspector's Rules III. and VI. were also obligatory upon both steamers, because if one of the rules was obligatory, the others were also.

Rule II. "When steamers are approaching each other in an oblique direction (as shown in diagram of the fourth situation) they shall pass to the right of each other as if meeting 'head and head' or nearly so, and the signals by whistle shall be given and answered promptly as in that case specified."

Rule III. "If when steamers are approaching each other, the pilot of either vessel fails to understand the course of the other, whether from signals being given or answered erroneously, or from other cause, the pilot so in doubt shall immediately signify the same by giving several short and rapid blasts of the steam whistle; and after the vessels have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerage way, until the proper signals are given, answered and understood, or until the vessels shall have passed each other."

Rule VI. "The signals by the blowing of the steam whistle shall be given and answered by pilots in compliance with these rules, not only when meeting 'head and head' or nearly so, but at all times when pass-

ing or meeting at a distance of within half a mile, and whether passing to the starboard or port."

It is clear that the New York failed to comply with these rules in regard to signals. The two steamers were meeting or passing within a distance which was much less than half a mile of each other, and therefore it was the duty of both to signal. Even if it were true that the Conemaugh was swinging to the port of the New York, which we think we have shown by the testimony cannot be true, their courses could not have been more than about a hundred feet apart. The duty of the New York to answer the Conemaugh's signals was therefore imperative. But it is suggested that the indications of the Conemaugh's lights were such that it might have been inferred therefrom that she was complying with her obligation to swing to starboard and out of the way of the New York. Such indications are very often deceptive, and the inference derived therefrom incorrect. Such was the fact in this case; for the master of the Conemaugh testifies expressly that he intended to "hang onto his course,"—to keep on his course across the bows of the New York. The purpose of the rules as to signals is to prevent mistakes being made, and the consequences of such mistakes. This is illustrated by the case of the *City of Norwalk*, 55 Fed., 98, where Judge Brown said:

> "But I do not find it necessary to determine the "precise position of either vessel in the channel, or "the lights which at different times might have "been exhibited to each other; for both were swing- "ing more or less, and different lights were no "doubt exposed to view at different times during a "short interval. Independently of these contro- "verted points, there is sufficient to charge both "the steamer and the tug with fault; because it "was a misunderstanding by each as to the sup- "posed intent of the other that caused the collision; "and this misunderstanding could not possibly

> "have happened had either given the signals re-
> "quired by the inspector's rules. * * * The
> "rules as to signals are designed for the purpose
> "of securing a common understanding, and of pre-
> "venting just such mistakes as the present." Citing
> "the Connecticut, 103 U. S., 710-713; The Sea King,
> "52 Fed., 894. "The duty to give such signal rested
> "upon each alike, and both were to blame for the
> "omission."

And in the same case the Circuit Court of Appeals for the Second Circuit, affirming the decision of Judge Brown, 61 Fed., 366, said:

> "Manifestly this collision happened because the
> "master of each vessel inferred from such indica-
> "tions as he noted, that the other was about to
> "take a particular one of two known courses, when,
> "in fact, the other's intention was to take the other
> "course. It is the very object of the law providing
> "for the giving of signals to increase the number
> "of indications which may be noted and reasoned
> "from, thus promoting the accuracy of the infer-
> "ences drawn from them. That both vessels failed
> "to conform to the inspector's rules is hardly dis-
> "puted. * * * When violation by each vessel
> "of an express rule in navigation is plainly appa-
> "rent, each must be held to blame, unless it is
> "clearly shown that the technical fault did not
> "contribute to the collision."

The Saginaw, 84 Fed., 705.
The Bowden, 78 Fed., 649-652.
The British Queen, 89 Fed., 1003.

As already stated, the vessels were certainly within half a mile of each other at the time the Conemaugh blew her second signal to the New York; and when they came within that distance it was the duty of each to signal under Rule VI., and the failure by either to signal would be a fault for which she should, prima facie, be condemned. If the New York did not hear the Conemaugh's

signal, then, under Rule VI., it was her imperative duty to signal to the Conemaugh. The duty to signal under Rule VI. was obligatory on both steamers. The New York failed to perform that duty, and was therefore in fault.

As already argued, the two blast signals of the Conemaugh were a distinct indication that she was not going to keep out of the way by porting, but that she was going across the New York's course. If the pilot of the New York did not understand this, if he was in doubt about it, it was his duty under Rule III., "immediately to signify the same by giving several short and repeated blasts of his steam whistle and reduce his speed to bare steerage way." If he was in doubt, he violated Rule III. by not doing so; and was therefore in fault and should be condemned under the rule that if a ship at the time of a collision is in actual violation of a rule intended to prevent collisions, the burden rests upon her of "showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been one of the causes of the disaster."

The Pennsylvania, 19 Wal., 136.
R. & O. Nav. Co. vs. Boston Mar. Ins. Co., 26 Fed., 596.

How can it be said that the failure of the New York to comply with the inspector's rules did not contribute to the collision? Who can say that if she had sounded either a one blast signal or an alarm, that the Conemaugh might not have checked or stopped, and thus have avoided the collision? But it is enough that the law presumes that her failure to comply with the rules did contribute to the collision, and that she was guilty of fault. The master of the Conemaugh testifies that he expected that the New York would starboard so as to pass between

him and the tow. It may be that he had no right to rely upon her doing so. A one blast signal from the New York would have corrected his misapprehension and probably have prevented the disaster.

IV.

AS THE CONEMAUGH AND NEW YORK WERE ON CROSSING COURSES WHICH INVOLVED RISK OF COLLISION, THE NEW YORK WAS NOT JUSTIFIED IN CHANGING HER COURSE BY PORTING, BECAUSE OF THE PRESENCE OF THE BARGES IN THE TOW OF THE BURLINGTON.

The question which arises under this proposition relates to the right of a steamer bound to hold her course, to deviate therefrom because of the intervention of another moving vessel.

It is an important fact not to be lost sight of that the Conemaugh had answered the two blast signal of the Burlington, and had starboarded to pass between the tow and the Canadian shore in compliance with that signal, before her watch discovered the presence or the approach of the New York; and that it was while she was thus heading towards the Canadian shore that she gave her first two blast signal to the New York. The officers of the New York ought to have heard, and had they maintained a proper lookout they doubtless would have heard the signals which were exchanged between the Burlington and the Conemaugh; and they should have known from those signals and the manner in which the Conemaugh starboarded, that she intended to pass down the river between the barges and the Canadian shore, and that she had so shaped her course for the purpose of carrying out her agreement with the Burlington. The officers of the New York knew of the presence of the tow; and if it was difficult for her master to locate the stern

barges definitely so as to determine the width of the channel between them and the Canadian shore, this fact, in connection with the other fact that the Conemaugh was intending to pass down through that channel, required the New York to move with great caution, especially as he knew, or ought to have known, that he would probably meet the Conemaugh in that narrow channel if he changed his course to starboard.

The rule laid down in the *John L. Hasbrook*, 93 U. S., 405, that a sailing vessel required to keep her course when approaching a steamer so as to involve risk of collision, does not violate her duty by such necessary variations of her course as to enable her to avoid immediate danger arising from natural obstructions to navigation, ought not to be applied to the New York in this case. The barges were not natural or fixed obstructions, like a rock, or bank, or shoal. They did not constitute such an obstruction as would justify the New York in departing from her course and rushing into the narrow channel near the Canadian shore, where she knew or ought to have known she was likely to meet the Conemaugh. The barges were vessels under way, moving in a direction diagonally across the river which would take them out of the way of the New York. They were in the tow of the Burlington, and their speed independent of the current was at least two or three miles an hour. They would have gotten out of the way, and left the New York a clear and unobstructed passage on her course, if the latter had but checked her speed for a few moments. Common prudence, and the "special circumstances of the case," required the New York to check her speed and keep her course until the barges got out of the way. Had she done so, even for a few moments, no collision would have happened.

The narrowness of the channel, and the fact that the Conemaugh was about to enter that channel on a course which crossed the course of the New York, increased the danger of navigation, and it was but a common precaution "required by the ordinary practice of seamen," and "by the special circumstances of the case," for the New York to check or stop until the barges got out of her way, and not to port and continue on with unabated speed. And I submit with deference that the doctrine laid down by the Circuit Court of Appeals in its opinion (Rec., p. 280) that the proper course of the New York "could not be affected by the fact of the Conemaugh's presence," is not consistent with the rules of navigation prescribed by Congress, and is likely to lead to disastrous results in the navigation of such a thoroughfare of commerce as the Detroit River. The New York, therefore, should be held in fault for violating Rule 24, which declares that:

> "In construing and obeying these rules due re-
> "gard must be had to all the dangers of navigation
> "and to any special circumstance which may exist
> "in any particular case, rendering a departure
> "from them necessary in order to avoid immediate
> "danger."

She also violated Article 20, which declares:

> "Nothing in these rules shall exonerate any ship
> "or the owner or master or crew thereof from the
> "consequences of any neglect to carry lights or sig-
> "nals, or of any neglect to keep a proper lookout,
> "or the neglect of any precaution which may be re-
> "quired by the ordinary practice of seamen, or by
> "the special circumstances of the case."

The Elizabeth Jones, 112 U. S., 514.

If the pilot of the New York was not willing that the Conemaugh should carry out her agreement with the Burlington to pass around the tow leaving it on her starboard hand, or if he was in doubt as to what the course

of the Conemaugh would be in carrying out that agreement, he should have sounded an alarm as required by Inspector's Rlue III. As he did not do so, it was emphatically a case which required him to keep his course and not to port so as to thwart the efforts of the Conemaugh.

Another reason why the New York was in fault for not holding her course and checking, if necessary, until the barges got out of her way, is that the channel between the barges and the Canadian shore being a narrow one, in which there was a considerable current, the Conemaugh, as the *descending vessel, had the right of way.*

There was no necessity for the New York to change her course on account of the barges. At most it was merely a matter of convenience on her part to do so, and it is well settled that a vessel whose duty it is to hold her course is not justified in departing therefrom simply because it is *convenient* for her to do so. She must hold her course unless prevented from doing so by some *necessity* or vis major.

The Illinois, 103 U. S., 298.
Marsden on Collisions, 493.
The Clara Davidson, 24 Fed., 763-766.
Spencer on Collisions, p. 202.

V.

IF THE NEW YORK WAS IN FAULT FOR THE COLLISION, SHE IS LIABLE TO THE OWNERS OF THE CARGO FOR THE FULL AMOUNT OF THEIR DAMAGES, ALTHOUGH THE CONEMAUGH WAS ALSO IN FAULT.

The owner or underwriter on the cargo in cases of collision brought about by the mutual faults of the colliding vessels, has the right to pursue either, or both, of the wrongdoers.

The Alabama and the Gamecock, 92 U. S., 695.
The Virginia, Ehrman, 97 U. S., 309, 3 17.
The Atlas, 93 U. S., 312.
The Beaconsfield, 158 U. S., 303.

The collision in this case occurred on October 21st, 1891, before the adoption of the Harter Act, and the rights of the parties, therefore, are not affected by that act.

In the Juniata, 93 U. S., 337, the steam tug Neafie was towing a flat boat and her cargo, both belonging to the United States; and while so engaged came into collision with the Juniata, which resulted in the loss of the flat boat and cargo, and also in damages to Pursglove, the owner of the steam tug. The courts below held both the Neafie and the Juniata in fault, and decree that the Juniata should pay $10,000 to Pursglove and $1,263.75 to the United States for half of the damages sustained by those parties respectively. On appeal, the Supreme Court reversed these decrees and followed the rule in the Atlas, that where an innocent party suffers damages by collision resulting from the mutual fault of two vessels, only one of which is libelled, the decree should be against such vessel for the whole amount of the damages, and not

for a moiety thereof. In the opinion delivered by Justice Swayne it is said:

> "The branch of the case relative to the United "States is upon a different footing. Their flat boat "is neither alleged nor proved to have been in any- "wise in fault. The principle of apportionment has, "therefore, no application to them. Their boat not "being inculpated, they are entitled to full dam- "ages. The decree of the Circuit Court is errone- "ous in not giving it to them. We should not ad- "judge that half of the amount should be paid by "the tug and the other half by the steamer, but that "the libel of the United States is against the steam- "er alone. The tug, therefore, cannot be reached in "this proceeding. But the offense being a marine "tort, and both being guilty, they are liable sever- "ally, as well as jointly, for the entire amount of "the damages. The decree must, therefore, be "changed, so as to require full payment to be made "to the United States by the claimants of the Juni- "ata. Whatever their rights may be as against "Pursglove, by reason of such payment of more "than one-half, must be settled in another proceed- "ing. It cannot be done in this litigation."

The rights of the interveners in the case at bar fall directly within the rule laid down in the Juniata. They are to be treated as libellants against the New York alone. The relief prayed for by them is against that steamer alone, and they are entitled to the same relief against her as if they had filed independent libels against her. The original libel having been filed in behalf of the interveners as insurers of the cargo, as well as in behalf of the owners of the Conemaugh, and the New York having been bonded to answer the entire claim made by the libel, the interveners could not bring an independent action, but were compelled to come into the case as interveners. Their rights, however, as against the New York are the same as

though they, and they alone, had filed an independent libel against her.

In the Nahor, 9 Fed., 213, a libel was filed by the owner, master and crew of a schooner to recover damages for her loss, her pending freight, and cargo, and the personal effects of the master and crew by a collision. The vessel proceeded against was released on bail for the whole amount claimed in the libel. Subsequently the owner of the cargo filed a second libel to recover its value. It was held that the second suit was improperly brought, that the cargo owner should have intervened in the first suit. The court said:

> "It is clear that the vessel having given bail for the value of the cargo in the first action, and the action being properly brought by the master and owners as carriers, for the loss of the cargo, she was not liable to be again arrested for the same cause of action. The proper and usual course in such a case, if the owner of the cargo desires to be made personally a party to the suit instead of trusting its management to his agents, the master and owners of the vessel, is to petition to be made co-libellant with them. The order of consolidating the actions in effect produces the same result; but as the commencement of the action was improper, the libellant Rokes must be charged with the costs of the second action, and the bond given therein must be cancelled without regard to the result of the first suit. The alleged reason for bringing the second suit is that counsel for the owner of the cargo entertained some doubts as to the relative rights of the owners of the cargo and the vessel, in case of an apportionment of the damages between the two colliding vessels. In any view that may be taken of the subject, I do not perceive that the position of the owner of the cargo could be any better as libellant in a second suit than it would have been as co-libellant in the first suit, as he could have made himself on motion. In any view of the case the filing of the second libel, and com-

pelling the giving of further security, was improper."

The C. H. Foster, 1 Fed., 733.
The Anchoria, 9 Fed., 840.
The Grand Republic, 10 Fed., 398.
Fritz vs. Bull, 12 How., 468.

Where the owner of the carrying vessel files a libel in behalf of himself and as trustee for the owners or underwriters on the cargo, he acts in a double capacity. His rights as trustee for the cargo interest, with respect to the vessel proceeded against may be much greater than his rights as owner of the injured vessel. And whether he is allowed to prosecute the suit entirely in his own name, or whether the owners or underwriters of the cargo intervene, for their own interests as they are entitled to do, and as they have done in this case against the New York alone, the court will enforce their claims to the full extent against that vessel if she is found in fault.

It should be borne in mind that the cause stands in this court against the New York alone. Her owners have not sought to compel a contribution to the interveners for the loss of the cargo by impleading the Conemaugh under the 59th rule, or otherwise. Had they done so, the case might, perhaps, be somewhat different. But as it stands, the right of the interveners to *full* indemnity from the New York is clearly recognized by the decision of the Supreme Court in the Beaconsfield, 158 U. S., 303, where it is said:

> "Had no petition under the 59th rule been filed against the Beaconsfield by the French Company, the case would have stood quite differently, as there would have been no suit against the Beaconsfield upon which a decree could be rendered."

So here, as no petition has been filed against the Conemaugh by the owners of the New York to compel contribution, there is no suit against the Conemaugh "upon

which a decree can be rendered;" and, therefore, the decree as far as the interveners are concerned, must be against the New York for the entire damage done to the cargo.

See also

The Juniata, cited ante.
The Chattahooche, 74 Fed., 904.

The rights of the cargo underwriters to claim full damages against the New York are not affected by the terms of the bill of lading, which is set forth in the Record, p. 269.

Even if the bill of lading be such as to preclude the underwriters from recovering damages resulting to the cargo from the Conemaugh, the New York is not thereby relieved from her liability.

A shipper may make such contract as he chooses with the carrier. If the carrier is not a common carrier, they may agree that he shall not be liable for damages resulting from collision. But can such a contract be invoked by a stranger who is a wrongdoer, who negligently or recklessly runs the carrying vessel down and destroys the cargo? Under what principle of law ought *he* to be permitted to claim the benefit of such contract? The carrier may be a mere bailee, and the shipper may be willing to assume the risk of collision so far as such bailee is concerned; but this will not justify a third party in destroying the cargo, or limit his liability for such wrongful act.

The rule that a release of one joint tort feasor is a release of all has no application to a case like this, and cannot operate to relieve the New York if both vessels are found to be in fault for the collision.

The rule has no application in courts of admiralty, which administer relief upon equitable principles; and there is no equity in the claim of the New York to be relieved from her liability even if the Conemaugh cannot be held for the damages to the cargo. We believe that no

case can be found which sustains the owner of the New York upon this point; and the absence of all authority tends to show that the claim has no support in the law. It is certainly contrary to the rule laid down by the court in the *Alabama and the Gamecock*, and in other cases, which expressly recognize the rule that in cases of collision resulting from mutual fault of the colliding vessels, the cargo owners have the right to pursue either or both, and recover full compensation from either or both, as they may elect.

The principle that a release of one wrongdoer operates as a bar in favor of the other wrongdoers is strictly legal —not equitable—and is confined to actions at law. It is based upon the principle that "the injured party has actually received satisfaction," or what in law is deemed the equivalent.

Cooley on Torts. 139.

As he can only have satisfaction once, if he accepts it voluntarily from one wrongdoer, it operates as a bar as to all. But it is believed that the principle is confined only to cases of "wrongs intended," where the several persons unite and act in concert in doing a wrong to another. It is doubtful if it applies in any case where the wrongdoers do not act in concert.

In 1 Jaggard on Torts, 345, it is said:

> "The American cases recognize only satisfaction as a bar to suit against joint tort feasors. When the cause of action is once satisfied, it ceases to exist. Where, however, there is a wrong in which several persons join without concert, the release of one is not the release of all. They are not, strictly speaking, joint tort feasors."

And at page 212 it is said:

> "Nor is mere similarity of design or conduct on the part of independent actors sufficient to con-

stitute such actors joint tort feasors. There is a marked distinction between a tort and liability arising from a tort. The liability as between the plaintiff and the defendant may always be treated as several, but the wrong itself may be jointly done or severally done by the defendants. If it be jointly done—that is, in concert—the defendants are joint tort feasors; if it be severally done—that is, independently, though for a similar purpose and at the same time—without any concert of action, they are several tort feasors."

It cannot be said that the New York and Conemaugh were acting in concert. They were not, therefore, strictly speaking, joint tort feasors.

If the doctrine contended for by the owner of the New York in Court of Appeals is correct it would lead to this result, viz, that whenever the owner of one vessel is relieved of liability by operation of law or otherwise, the owner of the other vessel, if both vessels were in fault, would also be relieved. Such ought not to be the law.

When it is said that the release of one of several tort feasors operates to discharge the other tort feasor from liability, reference is usually, if not always, had to a technical release under seal. When anything else is relied upon, the question is always open as to the intention of the parties, which is to be determined by testimony and the surrounding facts and circumstances.

Ellis vs. Esson, 50 Wis., 138.

Whether settlement, or payment, or discharge of one of several tort feasors shall operate as a release of the others, depends upon circumstances and the intention of the parties.

Duck vs. Mayeu, L. R., 1892, Q. B. D., 571.
City of Chicago vs. Babcock, 143 Ill., 358.

If the Court is free to distribute the loss arising from damage to the cargo "according to the relative faults of the guilty parties," then it would be simply just under the circumstances to allow the interveners to recover their entire loss against the New York; and as to them the decree of the District Court should be affirmed.

The fault of the New York is not only tacitly admitted by her answer and by the failure to produce her witnesses, but it was openly confessed in the court below, as shown by Mr. Goulder's affidavit (Rec., p. 203).

There are other reasons why the owners of the New York are not entitled to claim any deduction from their liability to the cargo underwriters, on account of the conditions in the bill of lading.

1. Because the point was not raised by any of the parties in the District Court, either by the pleadings, proofs or in any other manner.

2. The final decree of the District Court (Rec., p. 206) awarded to the underwriters the full amount of their claims against the New York, and no error was assigned by the owners of the New York to this part of the decree when they appealed therefrom to the Circuit Court of Appeals.

See Rec., p. 209.

3. Whatever rights the owners of the New York could *possibly* have had in this regard, they were waived by the stipulation entered into by proctors for the respective parties, which reads as follows:

> "Inasmuch as there is *no question* at issue as to "amount of damages awarded by the decree of the "District Court in this cause, or as to the right of "the intervening insurance companies to share "therein *according to said decree*, it is, therefore, "hereby stipulated that in making return to the "appeal in this cause the clerk of the District Court

"may omit from the transcript of the record all "proceedings had in ascertaining the damages of "the libelant and intervening petitioners except "the stipulation of the parties which fixes the "amount of the damages to the propeller New York "by said collision. And said District Clerk may "also omit from said transcript copies of the peti- "tions of the intervening insurance companies and "all orders made by said District Court with refer- "ence thereto other than the final decree." (Rec., p. 213.)

This stipulation is an admission on the part of *all* the parties of the right of the interveners to recover the full amount awarded to them by the decree of the District Court if the New York was in fault for the collision.

The decree of the District Court awards to each of the insurance companies certain specific sums as their damages against the New York. (Rec., 206.) The stipulation referred to estops the parties from questioning the correctness of these amounts, and estops the owners of the New York from denying their liability for these amounts to the underwriters if their steamer was in fault. An examination of the record shows that no question was made in the District Court as to the rights of the underwriters on account of the bill of lading. It was first suggested at the argument in the Circuit Court of Appeals.

I submit that the decree of the District Court should be affirmed as to the claims of the underwriters.

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F. H. & G. L. CANFIELD,
Proctors.